Oral Argument Not Yet Scheduled

Nos. 19-70392

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

NATURAL LIFE, INC. D/B/A
HEART AND WEIGHT INSTITUTE

Respondent

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the application of the National Labor Relations Board ("the Board") to enforce a Board Order issued against Natural Life, Inc. d/b/a Heart and Weight Institute ("Natural Life") on March 30, 2018,

reported at 366 NLRB No. 53. (ER 1-15.)[1] The Board had subject matter jurisdiction over the unfair labor practice proceedings under Section 10(a) of the National Labor Relations Act, as amended ("the Act"), 29 U.S.C. §§ 151 et seq., 160(a). Its Order is final under Section 10(e) of the Act, 29 U.S.C. § 160(e). The Board's application for enforcement, filed on February 19, 2019, was timely, as the Act imposes no time limits on the institution of proceedings to enforce Board orders. Venue is proper in this Court under Section 10(e) because Natural Life committed the unfair labor practices in Las Vegas, Nevada.

STATEMENT OF THE ISSUES

1. Whether the Board is entitled to summary enforcement of the uncontested portions of its Order finding that Natural Life violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), when it created the impression that it was engaged in surveillance of its employees' protected concerted activities and informed them that they were being discharged, and would not be rehired, because they engaged in such activities.

[1] Citations are to the Excerpts of Record ("ER") filed with Natural Life's opening brief ("Br.") and the Supplemental Excerpts of Record ("SER") filed with the Board's answering brief. References preceding a semicolon are to the Board's findings; references following it are to the supporting evidence.

2. Whether substantial evidence supports the Board's finding that Natural Life violated Section 8(a)(1) when it discharged nine employees because they engaged in protected concerted activities.

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Relevant sections of the National Labor Relations Act and the Board's Rules and Regulations are reproduced in the Addendum to this brief.

CONCISE STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Upon charges filed by employee Myeasha Strain, the Board's Regional Director issued a complaint on behalf of the General Counsel, alleging that Natural Life committed several violations of Section 8(a)(1) of the Act. (ER 3; ER 783-93.) Following a hearing, an administrative law judge found that Natural Life committed a number of the alleged violations, including: creating an impression of surveillance of employees' protected concerted activities; coercively telling employees that they were being discharged, and would not be rehired, because of those activities; discharging nine employees for engaging in protected concerted activities, or because Natural Life believed they engaged in such activities, and refusing to recall certain of those employees for engaging in protected concerted activities. (ER 13-14.)

On review, the Board affirmed the judge's rulings, findings, and conclusions regarding its unlawful impression of surveillance, coercive statement, and retaliatory discharges. A majority of the Board found it unnecessary to pass on the judge's refusal-to-recall finding because that additional violation would not materially affect the remedy. (ER 1 & n.3.) Below are summaries of the Board's findings of fact and its conclusions and Order.

II. THE BOARD'S FINDINGS OF FACT

A. Background; Natural Life Employees Sell Health Supplements by Phone

Natural Life is a telemarketing company that sells and distributes health supplements through its sales office in Las Vegas, Nevada. (ER 7; ER 352, 622.) Konstantine (Kony) Stoyanov is the owner and president of Natural Life. (ER 7; ER 178, 621, 352.) He also owns an affiliated company in Cebu, Philippines, which sometimes assists the sales employees in Las Vegas. (ER 7; ER 179, 622-23.)

Natural Life divides its sales employees into several classifications. (ER 7.) As relevant here, the "opener" cold calls potential customers to determine whether they are interested in purchasing the company's products. (ER 7; ER 355, 633.) If so, the "closer" calls the potential customer back and finishes, or tries to finish, the sale. (ER 7; ER 356-57, 633.) The "bumper" or "verifier" then calls the customer to verify the transaction. (ER 7; ER 358-59, 614-15, 633-34.) In the process, the

bumper tries to upsell the customer, for example by offering a package deal, such as a year's product for a reduced, lump-sum payment. (ER 7; ER 187-88, 358-59, 633.) The flat wage rate and commission for Natural Life's sales employees varies by classification and constantly fluctuates. (ER 7; ER 353, 356-64.) Of the three classifications, bumper/verifier is the position with the highest compensation and greatest responsibility. (ER 7; ER 356-59.)

At various times, Natural Life has used openers in the Philippines to initiate calls to potential customers in the United States, with closers in Las Vegas taking over thereafter. (ER 7; ER 436, 732-33.) At other times, Natural Life has required its sales employees to sell "front-to-back," meaning the same employee both opens and closes the transaction. (ER 7, 8; ER 440-41, 445.) The sales employees refer to the use of separate openers as having a "warm lead" because the closers only have to deal with customers who have already showed interest in the product. (ER 8; ER 436, 446-47.)

Although Stoyanov spends approximately 70 to 80 percent of the year outside the United States, he maintains ultimate decision-making authority and regularly communicates with local management in Las Vegas. (ER 7; ER 185-86.) During the relevant timeframe, local management included Sales Director Jim Spencer (the highest-ranking manager) and Sales Manager John Finley. (ER 7; ER 155, 162, 198, 370, 414, 534, 620.) Before March 2016, Linda Guggia was also a

sales manager. Around that time, Natural Life restructured its sales department and consolidated its offices, and in the process, returned Guggia to her former position of bumper. (ER 7; ER 163, 497, 531-34, 615-16.) After the restructuring, however, Guggia served as the acting sales manager in Finley's absence until July 2016, and, during those times, she would instruct employees and direct their breaks. (ER 7; ER 176, 329-30, 492, 511-12, 572-73.) Starting in July, she also helped conduct daily morning meetings with sales employees. (ER 7; ER 175-76, 324, 458, 558.) Guggia returned to the sales manager position in August 2016. (ER 7; ER 618-19, 667.)

B. Natural Life Sales Employees Increasingly Complain Among Themselves and to Management About the Terms and Conditions of Their Employment

As Natural Life stipulated, "at various times from the end of 2013 to 2015, [Strain] and other employees engaged in concerted activities by making complaints to human resources and management regarding racism and sexism in the workplace." (ER 8-9, 12; ER 392.) For example, in 2014, employees objected when Spencer, then sales manager, used a racist term while singing a song to the sales employees. (ER 4, 8; ER 372-77.) Strain complained to Stoyanov, who said he would speak with Spencer, but the behavior continued. (ER 8; ER 377-78, 380.) Thereafter, Strain repeatedly complained about Spencer to Stoyanov, who told her that "you guys need to get along." (ER 8; ER 383.)

On another occasion, Spencer, who had risen to sales director despite the complaints, made a racist comment to African American employees about liking chicken and a sexist comment to Strain about her breasts. (ER 7, 8; ER 162, 383-84, 386.) An employee who overheard Spencer's comment to Strain told him he should not say that and filed a complaint with human resources. (ER 8; ER 384.) Human resources later met with sales employees one-on-one so they could write up their complaints. (ER 8; ER 391.) Strain gave human resources a written complaint about Spencer's behavior. (ER 8; ER 386, 391.)

When Finley became sales manager in mid-2015, Strain, and other employees, complained to him about Spencer's racist and sexist comments, their fluctuating rules and pay, and their desire for better benefits. (ER 8; ER 415-18.) They also complained about a newly instituted fingerprinting system for signing in. (ER 8; ER 411-14, 416.)

As Natural Life further stipulated, from February 5 to August 3, 2016, its employees complained about deductions from their pay, office negativity, and other terms and conditions of their employment. (ER 9; ER 349-50.) More specifically, Strain and other employees complained that Natural Life was taking money out of their paychecks when customers returned products that bumpers had upsold, which Natural Life and its employees referred to as "bumped charge

backs."[2] (ER 8-9, 12; ER 462, 482-85.) From May to July 2016, Strain spoke with other employees at various locations on the premises about going to the Board or getting an attorney to fight the bumped charge backs. They also raised the issue with Finley. (ER 4, 8; ER 461-63, 468-70, 489-90, 495, 570.)

In May 2016, Strain asked Finley why Natural Life had deducted approximately two hundred dollars from her paycheck. He responded that it was for bumped charge backs. Strain replied that she had not agreed to the deduction and told Finley that she would hire an attorney if Natural Life continued to deduct money from her paycheck without permission. Finley responded that he would tell Stoyanov. Eventually Stoyanov instructed Finley to pay her the money. (ER 8; ER 472-73, 475-76.)

The sales employees' complaints increased when Natural Life decided to stop using openers. (ER 8.) As of May 2016, Natural Life exclusively used openers in the Philippines. (ER 8; ER 216-17, 436-38, 440-42.) In around June, Guggia conducted a meeting with the sales employees and announced that Natural Life was eliminating the position of openers entirely and that employees would now sell front to back. (ER 7, 8; ER 219-20, 441-42, 445, 448-51.) During the

[2] When the bumper upsold a product, the other sales employee(s) responsible for the transaction were rewarded with a percentage of the sale. If the customer later returned the product, or refused to pay for it, Natural Life would deduct the percentage from the sales employee(s)' paychecks. (ER 462, 482-85.)

meeting, the sales employees, including Strain, objected to this change. (ER 8; ER 447-48, 450-53.) Strain specifically asked whether Guggia wanted to eliminate warm bumps (*i.e.*, only having to interact with demonstrably interested customers), and Guggia responded that Stoyanov and Finley had decided the cost of openers was too high. (ER 8; ER 450-51.) Strain told her that in the five years she had been at Natural Life, every manager who had tried front-to-back sales had failed. (ER 8; ER 451-52.) Natural Life implemented the change about a week later, and employees immediately saw reductions in their next paychecks. (ER 8; ER 453-54.) Thereafter, Strain and other sales employees frequently complained, at various locations on the premises, about the changes. They also raised the issue to Finley and Guggia "as a group" in morning meetings. (ER 8; ER 447-48, 453-58, 494-96, 657.)

On around July 5, Natural Life distributed new contracts to the sales employees. (ER 8; ER 478, SER 34.) According to their contracts, they would be charged back only for customer rejections of recurring bottle sales (one bottle at a time), not for bulk orders. (ER 8; ER 481-84.) But a week later, Finley announced the amount of money that Natural Life would take from their checks for bulk order charge backs. (ER 8; ER 478.) Thereafter, sales employees, including Strain, complained among themselves that this was not in their contracts. (ER 8; ER 478-84.)

Employees also took those complaints to management. On around July 15, Strain and sales employee Carrie Pappan went to speak to Finley. (ER 8; ER 479-81, 485, 488.) Strain confronted Finley about the charge backs. (ER 8; ER 479-80, 499.) Finley replied that he would get a copy of her contract and called human resources. (ER 8; ER 147, 486-87, 499.) He also said that he would contact Stoyanov. (ER 8; ER 147, 485-86.) Strain went back to her desk and overheard Pappan complaining to Finley about the same thing (the charge backs). Pappan claimed that Natural Life had her owing money to the company rather than getting paid. (ER 8; ER 485-86, 499.) About an hour later, Finley told Strain that Stoyanov said to pay her. (ER 8; ER 147, 487, 489, 499.)

On July 26, Strain sent Stoyanov an email, complaining that "[t]here's so much negativity coming from management daily." She expressed concerns about the way management was treating employees and about "how a certain someone can't make bonus." (ER 8; SER 12.)

C. Natural Life Discharges All Sales Employees

The next morning, Finley sent a message to the sales employees. (ER 6, 9; ER 510-11.) He said that Stoyanov had given him a personal day off because something was wrong with his water heater, and that he would see them the next day. (ER 6, 9; ER 511.) He also said, "I'm leaving [Guggia] in charge for today."

(ER 6, 9; ER 511-12.) Guggia was scheduled to leave on a cruise the next day. (ER 6; ER 237, 666.)

At approximately 11:30 a.m., Guggia began calling employees into her office one by one. (ER 9; ER 509, 514.) During Strain's one-on-one meeting, Guggia told her that Natural Life was trying to get rid of Finley and asked how Strain felt about that plan. Guggia also asked Strain, "[h]ow do you feel about working on my team if I can get a team together?" Strain responded, "I don't care. I just want to work." Guggia then stated that she and Stoyanov were discussing how to make the sales team work better. (ER 9; ER 513.)

Strain went back to work. (ER 9; ER 514.) At 2 p.m., Guggia came into the sales room, along with IT Manager Shawn Hensley. (ER 9; ER 514-15.) Guggia asked everyone to get off the phones and announced that Natural Life was "closing the doors today." (ER 9; ER 397, 515-17.) During an earlier conversation over Skype, Stoyanov had told Guggia to communicate the closing to the sales employees. (ER 9; ER 233, 252-55, 257-58, 274-76, 294, 320, 401, 653.) Guggia and Hensley both stated that they had tried without success to get Stoyanov to reconsider his decision. Guggia also said, "[y]ou know, you guys already know what you've been doing, people have been complaining." (ER 9; ER 517.) At this point, Strain started recording the meeting with her cellphone. (ER 9; ER 516-17, 576-85.)

Both Guggia and Hensley told the sales department employees that they were fired. (ER 9.) After Guggia offered to help them get other jobs, Strain, Guggia, and Hensley had the following exchange:

> Strain: So basically, Kony fired everybody.
>
> Hensley: Everybody's gone.
>
> Guggia: Yup.
>
> Hensley: He's shut it down.
>
> Guggia: He can't afford to pay us anymore . . . . [W]e have to close the doors."

(ER 9; ER 577-78.)

As far as the reason for the closure, Guggia further explained to the sales employees:

> [T]his is what happens when you have angry people all the time, and you have [Quality Assurance] constantly listening to what we say behind closed doors, behind . . . to each other, side by side; they have recordings of people saying things that are just horrible. They have a whole conversation of people talking about a lawsuit like, like, a half an hour long. How could that . . . you know like, it's not . . . it just gets to the point where you're just like, you know what, I don't want to deal with people that, you know, want to do that to me. You pick and choose who you want down the road to work with you, and you just do your own thing and find homes for everybody." (ER 578-79.)

Guggia repeatedly tied the closure to the employees' negativity (ER 576, 578-79, 580, 582-83) and their inability to get along with each other and certain managers (ER 576, 578-79, 583). She also referenced employee complaints,

including about their base salaries (ER 577-78, 582), bump backs (ER 582), and the openers in Cebu (ER 576-80). Several times she mentioned that "everybody wants to sue" the company. (ER 576, 579-80.)

Contrary to her earlier remarks, Guggia also made statements indicating that the closure was not permanent. She told the employees that she would be coming back to work on Monday after her vacation. And she and Hensley both referenced a need to "restructure[]" the department. (ER 9; ER 579.) As Guggia told them, "I want the best team. I want the best people. I don't want people who want to sue. I don't want people who are gonna constantly nag . . . . I wanna work with people that . . . are happy and are smiling again." She went on to tell them that if they ever wanted to be on her team again one day, they had to fit that criteria. (ER 9; ER 580.) As she later said, "I foresee us working together soon." (ER 9; ER 581.) At the same meeting, Guggia also announced that she had transferred sales employee Emmanuel Findley to customer service. (ER 9, 10; ER 159, 580-81.) Ultimately, Natural Life discharged nine sales employees when it closed the sales department that day. (ER 1 n.4, 13 & n.28; SER 17-29.)

D. Natural Life Immediately Rehires Employees for Its Sales Department

Despite discharging its entire sales department, Stoyanov and Guggia had plans to reopen almost immediately. (ER 5; ER 257-58.) By August 2, around the time Guggia returned from her vacation, two employees from customer service,

and former sales employee Pappan were working as sales agents. (ER 10; ER 313-15, 664-65, SER 17-20, 33.) Next, Guggia rehired sales employee Donovon Boyd on August 10. (ER 10; ER 665, SER 17-20, 32.) And in mid-August, Guggia rehired sales employee Jennifer Smith and at least two other salespersons who had previous experience with Natural Life but were not employed (or discharged) on July 27. (ER 10; ER 315-16, 664, 668-69, SER 17-20, 30.) As mentioned above (p. 6), by mid-August, Natural Life had designated Guggia as the sales manager and bumper of the Las Vegas sales department. (ER 10; ER 618-19, 622, 667.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On March 30, 2018, the Board (then-Chairman Kaplan and Members McFerran and Emanuel) affirmed most of the administrative law judge's rulings, findings, and conclusions, and adopted the judge's recommended Order, as modified. (ER 1-3.) Specifically, the Board agreed that Natural Life violated Section 8(a)(1) of the Act when it discharged nine employees because they engaged in protected concerted activities. (ER 1 & n.3.) The Board also affirmed the judge's findings that Natural Life violated Section 8(a)(1) of the Act when it created an impression of surveillance of their protected concerted activities and informed employees that they were being discharged, and would not be rehired, because of their protected concerted activities. (ER 1 & n.3.) Regarding the latter two violations, the Board disregarded Natural Life's exceptions to the judge's

findings because Natural Life presented no argument in support of them, as required under the Board's Rules, 29 C.F.R. § 102.46(a)(1)(ii). (ER 1 & n.3.) Finally, a majority of the Board (then-Chairman Kaplan and Member Emanuel) found it unnecessary to pass on the judge's refusal-to-recall finding because that additional violation would not materially affect the remedy. (ER 1 n.3.)

The Board's Order directs Natural Life to cease and desist from the unfair labor practices found and from "[i]n any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act," 29 U.S.C. § 157. (ER 1.) Affirmatively, the Order requires Natural Life to offer full reinstatement to the six employees it has not rehired, make all nine discharged employees whole for any loss of earnings and benefits suffered as a result of the discrimination against them, remove any reference to the unlawful discharges from its files, and post a remedial notice.[3] (ER 2.) The Board also ordered Natural Life (or a Board agent) to read the remedial notice to its employees because, given the number of employees involved and the discharge of

[3] The Board included Findley among the individuals entitled to reinstatement, even though he may have had no break in employment due to his transfer to customer service. Natural Life did not present evidence of the transfer at the hearing, but the Board noted that it could do so later in a compliance hearing. (ER 1 n.4, 13 n.28.) *See NLRB v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 433*, 600 F.2d 770, 778 (9th Cir. 1979) (discussing Board's "two-step approach" of first determining liability, then (in separate proceeding) litigating specifics of compliance with Board Order).

an entire department, "an oral repudiation of the unlawful conduct is necessary to dispel its effects." (ER 1 n.4, 2.)

STANDARD OF REVIEW

The Board's findings of fact are conclusive if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951). Under this deferential standard, a reviewing court may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera*, 340 U.S. at 488. The Board's credibility findings are entitled to "special deference," *United Nurses Associations of Calif. v. NLRB*, 871 F.3d 767, 777 (9th Cir. 2017), and the Court will not reverse them unless they are "inherently incredible or patently unreasonable," *Retlaw Broad. Co. v. NLRB*, 53 F.3d 1002, 1006 (9th Cir. 1995). The Board's interpretation and application of the Act will be upheld if rational and consistent with the Act. *Id.* at 1005; *see Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398-99 (1996).

SUMMARY OF ARGUMENT

This is a straightforward case of retaliatory discharges. The administrative record includes a recording of Natural Life's agent, Linda Guggia, indisputably telling Natural Life's sales employees that the entire sales department was being

discharged, and would not be rehired, because they complained about the terms and conditions of their employment and discussed collectively taking legal action against the company. On that same recording, Guggia told the employees that Natural Life is "constantly listening to what we say behind closed doors," including to their protected concerted conversations about filing a lawsuit. (ER 578-79.) Accordingly, the Board found that Natural Life, through Guggia, violated Section 8(a)(1) of the Act by (1) creating an impression of surveillance of its employees' protected concerted activities; (2) coercively telling employees they were being discharged, and would not be rehired, because of their protected concerted activities; and (3) discharging nine employees because they engaged in those activities.

Regarding the first two Section 8(a)(1) violations, the Board is entitled to summary enforcement of the uncontested portions of its Order. Natural Life failed before the Board to preserve any challenge to them and scarcely mentions them before the Court. By ignoring them, Natural Life has waived any defense.

As for the contested violation, substantial evidence supports the Board's finding that the discharges were retaliatory. Natural Life's stipulations, witness testimony, and Guggia's July 27 recorded remarks plainly show that Natural Life knew that its sales employees were increasingly engaged in protected concerted activity. Eventually, their "complaining" (ER 517) reached a tipping point. And

Guggia's July 27 recorded remarks lay bare Natural Life's unlawful motivation for summarily discharging its entire sales department. Natural Life failed to prove that it would have discharged the sales department absent employees' protected concerted activities. As the Board reasonably found, Natural Life's asserted nondiscriminatory reasons for the discharges—(1) financial reasons (which the Board considered for the sake of argument even though it technically rejected certain evidence related to that defense) and (2) a lack of supervision while Guggia was vacationing—were pretextual.

Natural Life's attempts to escape the damning evidence of its unlawful conduct fall flat. Natural Life resorts to citing discredited testimony, disregarding inconvenient record evidence, regurgitating arguments easily rejected by the Board, and advancing new arguments not raised to the Board. In the process, it overlooks, and thus waives any challenge to many of the Board's actual findings.

Natural Life claims that Guggia's statements were unauthorized and unattributable to the company. But in arguing that Guggia was not its agent, Natural Life downplays its own witnesses' testimony that Natural Life's owner gave Guggia general authority to conduct the July 27 discharge meeting; ignores the ample, credited evidence showing that employees would reasonably believe Guggia was speaking as a management representative at that meeting; and disregards basic agency principles.

Natural Life's challenge to the Board's finding that its employees engaged in protected concerted activity is similarly unconvincing. Natural Life ignores the bulk of the record evidence the Board used to show protected concerted activity, and the Court lacks jurisdiction to consider its new claim that the judge improperly relied on its two stipulations as further evidence of that activity. 29 U.S.C. § 160(e).

As for Natural Life's affirmative defenses, Natural Life primarily argues that the Board erred in precluding evidence about its financial situation as a sanction for its subpoena noncompliance. Natural Life admittedly failed to comply with the General Counsel's subpoena (Br. 35-36), and it was well-within the Board's discretion to preclude Natural Life from later introducing a responsive document (and related evidence) on the last day of hearing after counsel for the General Counsel rested her case. Even if the Board had erred in excluding the evidence, Natural Life does not show, as it must, that it was prejudiced by the evidentiary ruling because the Board nevertheless considered and rejected Natural Life's purported economic justification for the discharges. Natural Life ignores that finding.

Nor does Natural Life directly challenge the Board's well-supported rejection of its "frankly, laughable" (ER 12) defense that it discharged the entire sales department merely because Guggia was scheduled to leave on a brief

vacation the next day. Natural Life's final salvo is that an adverse inference, drawn by the administrative law judge, was not harmless error, as the Board found. Natural Life, however, advances no argument that the adverse inference independently harmed its case, and the Court should reject that argument, too.

ARGUMENT

Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of" their Section 7 rights, including their right to engage in "concerted activities for the purpose of . . . mutual aid or protection," 29 U.S.C. § 157. As shown below in Part I, the Court should summarily enforce the uncontested portions of the Board's Order finding that Natural Life violated Section 8(a)(1) by (1) creating an impression that it was surveilling its employees' protected concerted activities and (2) coercively telling employees that they were being discharged, and would not be rehired, because of those activities. Part II, in turn, shows that Natural Life indisputably violated Section 8(a)(1) when it discharged its nine sales employees for engaging in protected concerted activities.

I. THE COURT SHOULD SUMMARILY ENFORCE THE UNCONTESTED PORTIONS OF THE BOARD'S ORDER REMEDYING THE IMPRESSION OF SURVEILLANCE AND COERCIVE STATEMENT VIOLATIONS

The Board is entitled to summary enforcement of the uncontested portions of its Order finding that Natural Life violated Section 8(a)(1) of the Act by (1)

creating an impression that it was surveilling its employees' protected concerted activities and (2) coercively telling employees that they were being discharged, and would not be rehired, because of those activities.[4] As shown below, Natural Life not only failed to adequately raise to the Board any objections to the judge's two findings, but it has also waived any possible challenge to them before the Court.

Section 10(e) of the Act states that "[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 666-67 (1982). To satisfy Section 10(e), a party must raise its objections in the time and manner required by the Board. *U.S. v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952); *NLRB v. Se. Ass'n for Retarded Citizens, Inc.*, 666 F.2d 428, 432 (9th Cir. 1982).

As relevant here, the Board's Rules and Regulations require a party challenging an administrative law judge's decision to file exceptions with the Board that include "the questions of procedure, fact, law, or policy to which

[4] Statements that create an impression that the employer is surveilling its employees' protected concerted activities violate Section 8(a)(1) of the Act, *NLRB v. Anchorage Times Pub. Co.*, 637 F.2d 1359, 1366 (9th Cir. 1981), as do statements that link an unlawful discharge to employees' protected activity, *NLRB v. Fort Vancouver Plywood Co.*, 604 F.2d 596, 599 n.1 (9th Cir. 1979); *Three D, LLC*, 361 NLRB 308, 308 n.2 (2014), *enforced*, 629 F. App'x 33, 38 (2d Cir. 2015).

exception is taken." 29 C.F.R. § 102.46(a)(1)(i)(A). Thus, generalized exceptions, without argument or citation, are insufficient to preserve an issue for future review. *See* 29 C.F.R. §§ 102.46(a)(1)(i), (ii) ("exception which fails to comply with [Rule's] requirements may be disregarded"), 102.48(a) ("if no timely *or proper* exceptions are filed, the findings, conclusions, and recommendations contained in the Administrative Law Judge's decision will . . . automatically become the decision and order of the Board . . . and all objections and exceptions must be deemed waived for all purposes" (emphasis added)); *see NLRB v. Seven-Up Bottling Co. of Miami*, 344 U.S. 344, 350 (1953); *Marshall Field & Co. v. NLRB*, 318 U.S. 253, 255 (1943). When a party objects to an issue first raised in the Board's decision, it must file a motion for reconsideration before the Board, to afford the Board an opportunity to correct the error, if any. *NLRB v. Legacy Health Sys.*, 662 F.3d 1124, 1127 (9th Cir. 2011) (citing cases); 29 C.F.R. § 102.48(c); *accord Nova Se. Univ. v. NLRB*, 807 F.3d 308, 313 (D.C. Cir. 2015).

Similarly, in this Court, a party's failure to challenge in its opening brief a Board finding "constitutes a waiver of further argument." *NLRB v. Sheet Metal Workers' Int'l Ass'n, Local 16*, 873 F.2d 236, 237 (9th Cir. 1989); *see Sparks Nugget, Inc. v. NLRB*, 968 F.2d 991, 998 (9th Cir. 1992) (party "waives its defense" to violations not contested in its opening brief); Fed. R. App. P.

28(a)(8)(A). In those circumstances, the Board is entitled to summary enforcement of the uncontested portions of its order. *Sheet Metal Workers'*, 873 F.2d at 237.

Here, Natural Life failed at every step to preserve any challenge to those two Section 8(a)(1) violations. Before the Board, Natural Life cursorily excepted to the administrative law judge's impression of surveillance and coercive statement findings. (ER 1 n.3, 11; SER 4-5, 7, 8.) Natural Life, however, made no argument regarding the relevant exceptions in its supporting brief, as required by the Board's Rules and Regulations. *See* 29 C.F.R. §§ 102.46(a)(1)(i), (ii). The Board accordingly disregarded Natural Life's exceptions, consistent with its rules and settled precedent, and adopted the judge's unchallenged findings. (ER 1 n.3, citing 29 C.F.R. § 102.46(a)(1)(ii) and *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 n.1 (2005), *enforced*, 456 F.3d 265 (1st Cir. 2006).) Natural Life then failed to seek reconsideration of the Board's decision to disregard its exceptions.

Likewise, before the Court, Natural Life does not challenge the Board's decision to disregard its exceptions, nor does it even attempt to challenge the Board's impression of surveillance and coercive statement findings. In fact, it only mentions one of them—the impression of surveillance—and only does so in summarizing the administrative law judge's decision in the procedural history section of its brief. (Br. 27.) The Board is therefore entitled to summary

enforcement of its order remedying those two uncontested Section 8(a)(1) violations.[5]

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT NATURAL LIFE VIOLATED SECTION 8(a)(1) OF THE ACT WHEN IT DISCHARGED NINE SALES EMPLOYEES BECAUSE THEY ENGAGED IN PROTECTED CONCERTED ACTIVITY

An employer violates Section 8(a)(1) of the Act when it takes an adverse employment action against employees for "exercising their right to engage in protected concerted activities," *NLRB v. Mike Yurosek & Son, Inc.*, 53 F.3d 261, 264 (9th Cir. 1995), or because it believes they engaged in protected concerted activities, *Holyoke Visiting Nurses Ass'n v. NLRB*, 11 F.3d 302, 307 (1st Cir. 1993) (discharge unlawful "if the employer was motivated by suspected [protected] activity"); *accord NLRB v. Link-Belt Co.*, 311 U.S. 584, 589-90 (1941). When the employer's motivation for an adverse employment action is in dispute, the Board applies its test, first articulated in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083, 1088-89 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981), and approved by the Supreme Court in *Transportation Management*, 462 U.S. 393 (1983). Under that test, if substantial evidence supports the Board's

[5] In its exceptions briefing before the Board (ER 85-91), and again here (Br. 31-34), Natural Life challenges Guggia's authority to make certain statements the Board used to show animus for the discharge decision, addressed pp. 35-41. Natural Life, however, does not (and did not before the Board) link its agency arguments to the two uncontested Section 8(a)(1) violations.

finding that protected activity was "a motivating factor" in an employer's decision to take adverse action against employees, the adverse action is unlawful unless the record as a whole compelled the Board to accept the employer's affirmative defense that it would have taken that adverse action even in the absence of protected activity. *Transp. Mgmt. Corp.*, 462 U.S. at 397, 401-03; *Mike Yurosek*, 53 F.3d at 267. An employer, however "cannot prove its affirmative defense when its 'asserted reasons for a discharge are found to be pretextual.'" *United Nurses*, 871 F.3d at 779 (quoting *Stevens Creek Chrysler Jeep Dodge, Inc.*, 357 NLRB 633, 637 (2011), *enforced sub nom., Mathew Enter., Inc. v. NLRB*, 498 F. App'x 45 (D.C. Cir. 2012)).

The Board can infer an employer's unlawful motivation from circumstantial as well as direct evidence, including, among other things, the employer's knowledge of employees' protected activity, and its expressed animus toward protected conduct. *United Nurses*, 871 F.3d at 779. Determining an employer's motive "is particularly within the purview of the Board[, . . .] and its inferences and findings must prevail where they are reasonable and supported by substantial evidence." *Clear Pine Mouldings, Inc. v. NLRB*, 632 F.2d 721, 726 (9th Cir. 1980).

A. Natural Life Knew that Its Employees Were Engaged in Mounting Protected Concerted Activity

The record is replete with evidence that Natural Life knew that its sales employees were engaged in protected concerted activity leading up to their discharge. (ER 12.) To be protected under Section 7 of the Act, employee conduct must be both "concerted" and engaged in for "mutual aid or protection." *Fresh & Easy Neighborhood Mkt., Inc.*, 361 NLRB 151, 152 (2014). Whether an employee's activity is "concerted" depends on some linkage to his coworkers, but the Act does not require that "employees combine with one another in any particular way." *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 831, 835 (1984); *Mike Yurosek*, 53 F.3d at 264. Rather, the term "concerted activities" includes "circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers Indus., Inc.*, 281 NLRB 882, 887 (1986), *enforced sub nom., Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987); *see City Disposal*, 465 U.S. at 831 (affirming Board's power to protect certain individual activities).

The separate concept of "mutual aid or protection" focuses on the goal of concerted activity; chiefly, whether the employees involved are seeking to "improve terms and conditions of employment or otherwise improve their lot as employees." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-67 (1978); *Mike Yurosek*, 53

F.3d at 266. It follows that Section 7 protects employees' concerted activities concerning their "wages, hours, or other working conditions," *Mike Yurosek*, 53 F.3d at 266, along with their protesting racism or sexism in the workplace, *Fresh & Easy*, 361 NLRB at 155; *see Tanner Motor Livery*, 148 NLRB 1402, 1404 (1964), *enforced in relevant part*, 349 F.2d 1, 4 (9th Cir. 1965) (employees' protesting racially discriminatory hiring practices); *Ellison Media Co.*, 344 NLRB 1112, 1113-14 & n.7 (2005) (employee discussions and complaints about supervisor's sexually suggestive comments). The Board has recently reaffirmed the long-held principle that the Act also "protect[s] employees when they pursue legal claims concertedly." *Cordua Restaurants, Inc.*, 368 NLRB No. 43, 2019 WL 3842331, at *4-5 & n.15 (Aug. 14, 2019) (citing cases), *petition for review and cross-application for enforcement pending*, Fifth Circuit Case No. 19-60630. Making a conclusion that activity is protected within the meaning of Section 7 is a task that "implicates [the Board's] expertise in labor relations" and is for "the Board to perform in the first instance." *City Disposal*, 465 U.S. at 829.

Natural Life's stipulations, witness testimony, and Guggia's July 27 recorded remarks provide ample record support for the Board's finding that Natural Life knew that its sales employees were engaged in protected concerted activity. (ER 12.) To start, Natural Life unequivocally stipulated that from February 5 to August 3, 2016, employees other than Strain "complained about . . .

canceled customer . . . orders, meaning deducting bump charge back fee[s] from employee pay." (ER 349-50.) Natural Life further stipulated that "there were complaints about . . . office negativity and employee complaints about other terms and conditions of employment" during that same period.[6] (ER 350.) Natural Life also stipulated that "at various times from the end of 2013 to 2015, [Strain] and other employees engaged in concerted activities by making complaints to human resources and management regarding racism and sexism in the workplace." (ER 392.)

Bolstering Natural Life's stipulations, the record contains ample additional evidence of Natural Life employees' protected concerted activities in the months leading up to their discharges. According to Stoyanov, his sales employees frequently complained about "[m]oney, leads, [and] management." (ER 204, 206.) Indeed, sales employees voiced group complaints in morning meetings with Finley and Guggia about losing their openers. And Strain engaged in protected activity with other sales employees from 2015 to the day before she was discharged, by speaking with her coworkers about their shared dissatisfaction with charge backs, bonuses, office negativity, outsourcing, and other terms and conditions of their

[6] Natural Life entered this stipulation to avoid litigation about its response to the General Counsel's subpoena. The subpoena requested documents pertaining to employees' protected concerted activity during this time period. (ER 139, 349-50 (discussing SER 43 ¶ 8).)

employment. She also brought those group concerns directly to management, namely Finley and Stoyanov. In addition, Strain spoke with her coworkers about collectively going to the Board or to an attorney because of the charge back issue, which she, and others, mentioned to Finley. Based on Guggia's July 27 recorded remarks, Natural Life plainly attributed the mounting employee complaints and discussions about collectively filing a lawsuit to all of its sales employees and accordingly, got rid of them as a group.[7] (ER 8, 12.)

Natural Life conveniently ignores the bulk of this evidence, and thus, apparently has no answer to the Board's finding that the record, as a whole, shows protected concerted activity. *See Martinez-Serrano v. INS*, 94 F.3d 1256, 1259 (9th Cir. 1996) (arguments not properly raised in opening brief are waived); Fed. R. App. P. 28(a)(8)(A). Instead, Natural Life cooks up new claims to evade its two

[7] Natural Life complains (Br. 43) that the record lacks specific evidence that each of the named sales employees engaged in protected concerted activities. But Natural Life does not acknowledge, let alone challenge, the Board's answer to this concern: that "employees are protected from discriminatory conduct by an employer due to their suspected union or other protected activity, even if the employer's belief is mistaken" (ER 12). *See Holyoke Visiting Nurses Ass'n*, 11 F.3d at 307; *Alternative Energy Applications, Inc.*, 361 NLRB 1203, 1205 (2014) (same analysis applies where "employer has retaliated against an employee in the *belief* that the employee engaged in protected activity" (emphasis in original)). Guggia's remarks indicate that Natural Life, at the very least, suspected or believed that all of its sales employees were engaged in protected concerted activity. By ignoring this finding, Natural Life has waived any challenge to it. *Martinez-Serrano v. INS*, 94 F.3d 1256, 1259 (9th Cir. 1996) (arguments not raised in opening brief are waived); Fed. R. App. P. 28(a)(8)(A).

stipulations, including that the Board improperly considered protected concerted activity outside the Act's statute of limitations, 29 U.S.C. § 160(b), and that it did not stipulate to its employees' 2016 protected concerted activity after all.[8] (Br. 38-44.) Natural Life, however, did not raise either of those arguments to the Board. In its brief supporting its exceptions, Natural Life cursorily claimed, without elaboration, that the administrative law judge's conclusion that its employees engaged in protected concerted activity was "simply not supported by the record." (ER 95.) That depthless treatment of the issue prevented the Board from receiving notice of, or analyzing in the first instance, the arguments Natural Life now presents to the Court. The Court is thus jurisdictionally barred from considering them now. *United Nurses*, 871 F.3d at 788 n.17 and cases cited p. 21.

In any event, Natural Life is wrong that the Board erred in considering conduct outside the Section 10(b) period. The Board did not find any unfair labor practices outside of the limitations period; it just detailed employees' protected activity during that period. It is well-settled that the Board may consider conduct outside the limitations period "as background to shed light on [an employer's] motivation for conduct within the 10(b) period." *Grimmway Farms*, 314 NLRB 73, 74 (1994); *accord Queen Mary Restaurants Corp. v. NLRB*, 560 F.2d 403, 407

[8] Section 10(b) provides, in relevant part, that "no complaint shall issue based upon any *unfair labor practice* occurring more than six months prior to the filing of the charge with the Board." 29 U.S.C. § 160(b) (emphasis added).

& n.2 (9th Cir. 1977) (considering employer's unlawful conduct outside Section 10(b) period as background evidence of animus).

That stipulated evidence was not, as Natural Life claims, "irrelevant" (Br. 40-41) to the protected concerted activities more proximate to the discharges. Rather, it shows Natural Life employees' longstanding and continued proclivity to join together in protest of their working environment and sets the stage for their later complaints. Moreover, Natural Life ignores that the complaint made reference to "other concerted activities" (ER 786), and it cannot credibly claim that it was blindsided when evidence it stipulated to appeared in the Board's decision.[9] *Cf. George C. Foss Co. v. NLRB*, 752 F.2d 1407, 1411 (9th Cir. 1985) (where issue is fully and fairly litigated at administrative hearing, Board may even find unalleged *unfair labor practice*) (citing *Clear Pine Mouldings*, 632 F.2d at 728).

Natural Life's attempt to wriggle out of its other stipulation, by arguing that it did not explicitly agree to the legal conclusion that the stipulated activities were concerted (Br. 41-43), fares no better. As discussed above, Natural Life's stipulation, examined along with Strain's testimony and Guggia's July 27 recorded remarks (ER 4), plainly evidences that its employees brought "truly group

[9] Natural Life's counsel responded "okay" when the administrative law judge advised her that actions outside the 10(b) period could be used as background (ER 371) and then, after Strain testified on this point without further, relevant objection (ER 372-92), stipulated to the protected concerted activity during that period (ER 392).

complaints" to the attention of management, both individually and in group meetings. *Meyers*, 281 NLRB at 887. That evidence also shows that they were seeking "to initiate or to induce or to prepare for group action" about the pay deductions, for example, by complaining to management, filing a collective lawsuit, or going to the Board. *Id.* Natural Life cannot escape the Board's well-supported conclusion by ignoring unfavorable record evidence and selectively reading its stipulation. *See NLRB v. Remington Lodging & Hosp., LLC*, 708 F. App'x 425, 426 (9th Cir. 2017) ("review of the Board's decisions requires 'a review of the whole record'" (quoting *Cal. Pac. Med. Ctr. v. NLRB*, 87 F.3d 304, 307 (9th Cir. 1996)).

B. Natural Life Terminated Its Entire Sales Department Because of Sales Employees' Protected Concerted Activity

In addition to showing that Natural Life knew of its employees' protected concerted activity, ample evidence also proves that Natural Life unlawfully discharged its nine sales employees because of its animus toward that activity. In her July 27 recorded remarks, Guggia indisputably linked the closure of Natural Life's sales department to its employees' protected concerted activity. Natural Life's claim that it should not be bound by Guggia's statements is neither supported by basic agency principles, nor by the record evidence.

1. The Board reasonably relied on direct evidence of Natural Life's unlawful motive

Substantial evidence amply supports the Board's finding that Natural Life, through Guggia, "unequivocally connected the closure of the sales department and the discharges of all of its employees" to their protected activity: "their conversations about filing a lawsuit; their negativity toward [Natural Life]; and their complaints about terms and conditions of employment, including base salaries and bump backs." (ER 12.) In essence, Natural Life fired its sales employees because "people have been complaining" about the terms and conditions of their employment. (ER 9; ER 517.) And it made clear that it would not consider rehiring "people who want to sue," or "who are gonna constantly nag" about those issues. (ER 9; ER 580.) Thus, the Board did not need to rely on circumstantial evidence or infer motive. For "where an employer's representatives have announced an intent to discharge or otherwise retaliate against an employee for engaging in protected activity, the Board has before it especially persuasive evidence that a subsequent discharge of the employee is unlawfully motivated."[10]

[10] Natural Life's claim that it treated its employees in "exactly the same manner" (Br. 34) does not help its cause, given that it treated them in exactly the same *unlawful* manner. As previously discussed (pp. 24, 29 n.7), an "[a]dverse employment action in retaliation for concerted activity violates the [Act], even if the employer wields an undiscerning axe." *RGC (USA) Mineral Sands, Inc. v. NLRB*, 281 F.3d 442, 448 (4th Cir. 2002) (alteration, citation, and quotation marks omitted); *NLRB v. Tesoro Petroleum Corp.*, 431 F.2d 95, 97 (9th Cir. 1970)

Turnbull Cone Baking Co. of Tennessee v. NLRB, 778 F.2d 292, 297 (6th Cir. 1985); *see RGC (USA) Mineral Sands, Inc. v. NLRB*, 281 F.3d 442, 449 (4th Cir. 2002) (circumstantial evidence unnecessary because employer stated directly that discriminatory assignments were because of union vote). *Cf. L'Eggs Prod., Inc. v. NLRB*, 619 F.2d 1337, 1343 (9th Cir. 1980) (pre-*Transportation Management* case noting that "outright confession of unlawful discrimination" eliminated "other causes suggested as the basis for the discharge").

In addition to its primary claim that Guggia lacked authority to make the statements indicating animus discussed below (pp. 35-41), Natural Life claims, without record support (Br. 43-44), that it purportedly tolerated the same employee complaints about compensation and sexism "over a matter of years" without any repercussions. That supposed tolerance, it suggests, shows that it could not have retaliated here. But, even if Natural Life had tolerated similar complaints for years, Guggia's July 27 recorded remarks plainly evidence Natural Life's view that the complaints, "negativity," and talk of legal action had reached a tipping point; as Guggia said, "[w]e can't take it." (ER 579, see ER 471 (Strain testimony that complaints increased in July 2016).) Moreover, Natural Life's purported past compliance with the Act cannot overcome the direct evidence linking the July 27

(unlawfully motivated discharge of four employees violated Act even though union proclivities of one employee were unknown).

discharges to Natural Life employees' protected activity. *See Alamo Rent-A-Car*, 336 NLRB 1155, 1156 (2001) ("fact that the [employer] initially tolerated [employee's] union activity does not prove that his ultimate discharge was unrelated to such activity") (citing *NLRB v. Main St. Terrace Care Ctr.*, 218 F.3d 531, 542 (6th Cir. 2000); *NLRB v. Vanguard Tours, Inc.*, 981 F.2d 62, 66 (2d Cir. 1992)).

2. Natural Life cannot negate animus by claiming that Guggia lacked authority to make statements linking the discharges to its employees' protected concerted activity

Faced with irrefutable evidence of its animus, Natural Life's principle recourse (Br. 29-34) is to disavow Guggia's statements as unauthorized and thus unattributable to Natural Life. But that claim is lacking both legal and record support. Substantial record evidence supports the Board's finding that "[u]nquestionably, Guggia was vested with actual and apparent authority when she conducted the July 27 meeting with employees and told them that they were terminated" (ER 10) and why.[11]

Under the Act, an employer is liable for the unlawful actions of its agents. 29 U.S.C. §§ 152(2) (defining "employer" as "any person acting as an agent of an

[11] Natural Life's argument that Guggia was not a supervisor (Br. 29-31) is immaterial because the Board based its findings on principles of agency. *See NLRB v. L.B. Foster Co.*, 418 F.2d 1, 2 & n.1 (9th Cir. 1969) (resolution of employee's supervisory status not necessary where substantial evidence in support of agency status).

employer, directly or indirectly"), 158(a) (describing unfair labor practices of "employer"). The Board applies common law agency principles, construed liberally, to determine whether an employee, in taking a particular action, is acting with authority on behalf of her employer. *Pan-Oston Co.*, 336 NLRB 305, 305 (2001); *see Int'l Ass'n of Machinists, Tool & Die Makers Lodge No. 35, v. NLRB*, 311 U.S. 72, 80 (1940). *Cf. NLRB v. Int'l Longshoremen's & Warehousemen's Union, Local 10*, 283 F.2d 558, 563 (9th Cir. 1960) ("[C]ommon law principles of agency [are] equally applicable to both labor and management groups."). Thus, agency may be based on actual or apparent authority. *NLRB v. Donkin's Inn, Inc.*, 532 F.2d 138, 141 (9th Cir. 1976); *PCC Structurals, Inc.*, 330 NLRB 868, 869 (2000).

Actual authority results when the principal authorizes the agent to perform a specific action or when the principal tells the agent generally what to do and she acts consistently with that direction. *See NLRB v. District Council of Iron Workers of the State of California & Vicinity*, 124 F.3d 1094, 1098 (9th Cir. 1997). "Apparent authority," in contrast, "results when the principal does something or permits the agent to do something which reasonably leads another to believe that the agent had the authority he purported to have." *Donkin's*, 532 F.2d at 141 (quoting *Hawaiian Paradise Park Corp. v. Friendly Broad. Co.*, 414 F.2d 750, 756 (9th Cir. 1969)). Consistent with that definition, the Board finds apparent authority

when an employer places an individual "in a position where employees could reasonably believe that he spoke on behalf of management." *Progressive Elec., Inc. v. NLRB*, 453 F.3d 538, 545-46 (D.C. Cir. 2006) (citing cases); *accord NLRB v. Int'l Medication Sys., Ltd.*, 640 F.2d 1110, 1112 n.1 (9th Cir. 1981) ("employer is properly held responsible for anyone acting as its agent when employees could reasonably believe that the agent was speaking for the employer"); *Hausner Hard-Chrome of Ky, Inc.*, 326 NLRB 426, 428 (1998) (employer may be liable for an employee's statements if employee is "held out as a conduit for transmitting information from management to other employees" (alteration and citation omitted)). As the Act spells out, "the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." 29 U.S.C. § 152(13). The Court reviews the Board's agency determination for substantial evidence. *See Donkin's*, 532 F.2d at 141 ("Issues regarding agency are generally treated as fact issues.").

Here, Natural Life cannot escape the testimony from its own witnesses that Stoyanov vested actual authority in Guggia to speak on Natural Life's behalf at the July 27 discharge meeting. Guggia testified that Stoyanov gave her authority to conduct the meeting. (ER 653.) And Stoyanov too admitted that he gave Guggia authority to hold the meeting, inform employees that they were being discharged, and rehire some of them a few days later. (ER 253-55, 257-58, 272-73.) When

asked if Guggia "represent[ed] you on July 27th as far as *why* the room was closing," Stoyanov responded, "Yes. Yes." (ER 294 (emphasis added).)

As for apparent authority, the Board found that "Guggia's statements at the meeting, with IT Manager Hen[s]ley's participation, clearly would have led employees to reasonably believe that she was speaking as a management representative." (ER 10.) Indeed, both Guggia and Hensley indicated that they were relaying Stoyanov's decision. And Guggia communicated the discharge decision to the sales employees as if she were part of management, stating that "we just decided to take a break, shut this door, and regroup ourselves" (ER 577); "we, we have to close the doors" (ER 578); and "let's restart. Let's completely regroup. If everybody feels that negative about the company, they shouldn't be here . . . we're just gonna regroup" (ER 583). She also spoke of management decisions unrelated to the closure, including that "[w]e gave [an employee] a raise" (ER 582) and their decision to move Findley to customer service (ER 580-81).

Further, as the Board pointed out, it was not unusual for Guggia to be put in charge at Natural Life. In the past, she had been sales manager, but even after her demotion to bumper, she continued to fill in for Finley when he was absent. She also regularly conducted meetings with employees and had been tasked with announcing company policies in the past, including Natural Life's unpopular decision to eliminate openers. (ER 10.) The July 27 discharge meeting was no

different. As Finley told the sales employees, Guggia was "in charge for today" (ER 6, 9; ER 511-12) and, as Stoyanov admitted, tasked with announcing their discharge. *See Quality Drywall Co.*, 254 NLRB 617, 620 (1981) (finding employer responsible for coercive interrogation where foreman sent agent with instructions to investigate employees). Thus, from reasonable employees' perspectives, she was plainly speaking on behalf of management, based on their past experience of having her in charge and on Guggia's remarks at the meeting.

Natural Life concedes that Stoyanov vested "limited authority" in Guggia to convey the discharge decision and that Guggia's statements "may be construed as demonstrative of animus" (Br. 33-34). It claims, however, that those statements were Guggia's personal opinion and thus cannot be used to show Stoyanov's motivation for discharging the sales employees.[12] (Br. 33-34.) That claim lacks record support. Stoyanov did not testify about Guggia's July 27 recorded remarks, and, before she learned that Strain had recorded the meeting, Guggia denied making them. (ER 656-59, 675-76.) In contrast, Guggia's recorded remarks themselves show that she was conveying Stoyanov's reasoning for the discharges, and not just her personal opinion. Indeed, Natural Life does not deny that Guggia

[12] *Idaho Falls*, cited by Natural Life (Br. 29), is distinguishable. Unlike here, the purported agents in that case prefaced their remarks by stating that they did not represent management and were only there to express personal opinions. *Idaho Falls Consol. Hosps., Inc. v. NLRB*, 731 F.2d 1384, 1387 (9th Cir. 1984).

made "statements indicating that the employees' attitudes factored into Stoyanov's decision." (Br. 20.) The Board reasonably took the recorded remarks at face value, considering Stoyanov's concession that Guggia represented him regarding why he was closing the sales department. (ER 294.) *See Unite Here! Local 5 v. NLRB*, 768 F. App'x 627, 628 (9th Cir. 2019) (stating that Court "defer[s] to the reasonable derivative inferences drawn by the Board from credited evidence" (citation omitted)). Moreover, neither the Act, nor common law principles of agency, require Stoyanov to have specifically authorized or "empowered" (Br. 33-34) Guggia's statements, as discussed above. *See* 29 U.S.C. § 152(13). *Cf. Longshoremen's, Local 10*, 283 F.2d at 564 ("Having created the [agent's] power, the [principal] must take the responsibility if it is wrongly used.").

As for apparent authority, Natural Life acknowledges the general principle, but fails to explain, given the credited evidence, its claim that employees would not reasonably believe that Guggia was speaking on Natural Life's behalf. (Br. 31-32.) Instead, to the extent its challenge to her apparent authority has any record support, Natural Life seemingly relies on Guggia's discredited claims that she was not typically put in charge in Finley's stead. (Br. 10-11, 32.) Natural Life's version of events, however, is not the one found credible by the Board. (ER 4-7.) And Natural Life's ignoring the credited evidence is no substitute for its showing that the Board's credibility findings were "inherently incredible or patently

unreasonable." *Retlaw Broad.*, 53 F.3d at 1006. In sum, Natural Life has made no compelling case for overturning the Board's well-supported agency finding.

C. Natural Life's Asserted Nondiscriminatory Reasons for the Discharges—Its Financial Situation and Lack of Supervision During Guggia's Vacation—Were Both Pretextual

Finally, substantial evidence supports the Board's finding that Natural Life failed to meet its burden of showing that it would have discharged the entire sales department absent sales employees' protected concerted activities. (ER 12.) *See Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 31 (D.C. Cir. 1998) (employer must prove that despite animus, it "*would* have fired [the employees] *because of*" nondiscriminatory reason, "not that it *could* have done so") (emphasis in original)). As the Board found (ER 12-13), Natural Life's asserted nondiscriminatory reasons for the discharges—(1) financial reasons (which the Board considered for the sake of argument even though it technically rejected certain evidence related to that defense), and (2) a lack of supervision while Guggia was vacationing—were both pretextual. *See id.* at 32 (Board's finding that asserted nondiscriminatory reason was pretextual serves as conclusive rejection of affirmative defense). *Cf. NLRB v. Nevis Indus., Inc.*, 647 F.2d 905, 910 (9th Cir. 1981) (pretext finding reinforces inference that true motive was unlawful); *Shattuck Denn Min. Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966) (same).

Natural Life does not meaningfully challenge the Board's well-supported finding that, even considering its purported financial losses, its financial defense was pretextual. Instead, it primarily attacks the Board's decision to preclude Natural Life from introducing certain evidence about its financial situation as a sanction for its noncompliance with the General Counsel's subpoena. That ruling was well-within the Board's discretion and, in any event, not prejudicial, as the Board considered the defense and the proffered evidence anyway. Likewise, Natural Life fails to challenge the merits of the Board's finding that its lack of supervision defense was pretextual. In its sole argument related to this defense, it fails to explain how the administrative law judge's adverse inference about the dates of Finley's employment prejudiced its case.

1. The Board reasonably rejected Natural Life's asserted financial justification for discharging its sales employees and did not err in sanctioning Natural Life for its subpoena noncompliance

As shown below, the Board reasonably rejected as pretextual Natural Life's claim that it discharged its entire sales department on July 27 because of its financial losses. First, this claim is simply not believable in light of Stoyanov's testimony and the sales department's prompt reopening. Second, Natural Life's argument (Br. 37) that the Board prevented it from presenting its financial defense by issuing overly severe sanctions for its subpoena noncompliance is without merit. The one-page exhibit that Natural Life sought to admit into evidence (after

failing to produce it to the General Counsel before the hearing) would not have changed the result, and the ruling did not prejudice Natural Life.

For well-supported reasons, the Board found it "inconceivable" that "economic considerations played any role in the timing of the closure." (ER 12.) The Board considered Natural Life's purported financial losses as explanation for the discharges "for the sake of argument" (ER 6, 12) despite issuing sanctions for its subpoena noncompliance. The Board precluded Natural Life from introducing Exhibit 3, a one-page document purportedly showing its profits and losses from January 1 to March 6, 2016, and other related evidence responsive to the General Counsel's subpoena, which sought documents showing the reason for the discharges. The Board, however, considered the rejected exhibit anyway, and could not "fathom how documents relating to business conditions for the first quarter of 2016" could explain the timing of the discharges on July 27, especially in light of Stoyanov's testimony. (ER 6.) As the Board explained, Stoyanov testified that his business had been losing money for years and/or was never profitable.[13] Thus, if Stoyanov was to be believed, he tolerated losses anywhere from three to twelve years without closing his business. Those long-term losses,

[13] Stoyanov testified that Natural Life was not profitable for the past three or four years, that it was never a profitable company (ER 212-13), and that closure was "on the table every single month" (ER 229). Given that Natural Life began operating in 2004, the judge found it incredible that Stoyanov operated a business at a loss for 12 years. (ER 6; ER 178.)

even if true, do little to explain his decision to close Natural Life's sales department on July 27, particularly in light of the sales employees' mounting protected concerted activity proximate to the closure. (ER 6.)

Moreover, any claimed economic bases for discharging the entire sales department are belied by Guggia's July 27 remarks, both to Strain and at the discharge meeting, revealing that Natural Life had concrete plans to immediately reopen and staff the department with employees who would not threaten lawsuits, complain about terms and conditions, or express negativity about the company. (ER 5, 12; ER 579-80.) By August 2, Natural Life was operating with a new sales team, including two employees from customer service and one former sales employee who had been discharged just days before. By mid-August, Natural Life had rehired two more former sales employees who were also discharged on July 27, plus two other former sales employees. From this evidence, the Board reasonably drew the inference that the sales department was discharged en masse, not because of Natural Life's dire financial straits, but because Natural Life believed they had all engaged in protected activity.

Natural Life ignores the Board's reasoning for rejecting its asserted financial explanation for the discharges. And it has therefore forfeited any challenge to the Board's pretext finding. *Martinez-Serrano*, 94 F.3d at 1259; Fed. R. App. P. 28(a)(8)(A). Instead, Natural Life focuses solely on the Board's refusal to admit

Exhibit 3 and certain related evidence as sanctions for its subpoena noncompliance. (Br. 34-37.) As discussed next, Natural Life fails to show either error in, or prejudice from, the Board's evidentiary ruling.

Before the hearing, the General Counsel issued a subpoena duces tecum requesting, among other things, "[d]ocuments and communications which set forth, discuss, and/or relate to the reasons for which [named employees] were discharged on July 27, 2016" and "on which [Natural Life] relied in discharging [named employees] on July 27, 2016." (ER 6; SER 44 ¶¶ 18, 19.) Natural Life seemingly responded to the subpoena on the first day of hearing. (ER 599-600.) But two days later, after counsel for the General Counsel had rested her case-in-chief, Natural Life sought to introduce a one-page, first quarter, profits and losses document. (ER 6; ER 176, 238-40.) Stoyanov testified, both on direct examination and voir dire, that he relied on that document in deciding to close Natural Life's Las Vegas sales department. (ER 6; ER 239-41.) The General Counsel objected that Natural Life had failed to comply with the subpoena and requested sanctions.[14] (ER 6; ER 241-44.) The judge agreed, rejected Exhibit 3, and barred Natural Life from presenting evidence about the subject matter

[14] Initially, Natural Life's counsel nonsensically claimed that the document was not responsive because it provided reasoning for the sales department's closure, but not the individual sales employees' discharges. (ER 6; ER 242-43.) The judge rejected that "rather creative" argument (ER 6), which Natural Life has since abandoned.

(economic reasons for the discharges) sought by the aforementioned provisions of the subpoena. (ER 6; ER 243, 247-50.)

Under Board law, "[t]he Board is entitled to impose a variety of sanctions to deal with subpoena noncompliance." *McAllister Towing & Transp. Co., Inc.*, 341 NLRB 394, 396 (2004), *enforced*, 156 F. App'x 386 (2d Cir. 2005); *accord M.D. Miller Trucking*, 361 NLRB 1225, 1225 n.1, 1228-29 (2014); *Perdue Farms, Inc.*, 323 NLRB 345, 348 (1997), *enforced*, 144 F.3d 830, 833-34 (D.C. Cir. 1998). The exercise of that authority is a matter committed to the judge's discretion and flows from the Board's "inherent 'interest [in] maintaining the integrity of the hearing process.'" *McAllister Towing*, 341 NLRB at 396 (quoting *NLRB v. C. H. Sprague & Son, Co.*, 428 F.2d 938, 942 (1st Cir. 1970)). A party challenging an evidentiary ruling on appeal must show not only that the Board abused its discretion, but that its case was prejudiced as a result of the Board's error. *NLRB v. Bakers of Paris, Inc.*, 929 F.2d 1427, 1434 (9th Cir. 1991); *NLRB v. Heath TEC Div./San Francisco*, 566 F.2d 1367, 1371 (9th Cir. 1978).

Natural Life has not showed that the Board abused its discretion when it rejected Exhibit 3 and precluded Natural Life from presenting certain evidence about its purported economic reasons for the discharges. Natural Life admits its failure to "strictly" comply with the subpoena, and it does not challenge the

Board's authority to impose sanctions.[15] (Br. 36.) Instead, it quibbles only with the Board's analysis and complains that the sanctions imposed here were too severe. (Br. 35-37.) But merely disagreeing with the Board's evidentiary ruling is not enough to prove error, as shown below.

To start, Natural Life is wrong that the Board erred in considering this a case of subpoena noncompliance, rather than delayed compliance. Thus, Natural Life's reliance on *People's Transportation Service*, 276 NLRB 169 (1985) (Br. 36), does not help its cause. That case suggests that the Board may view sanctions as "less clear" when a party produces a late-surfacing subpoenaed document immediately upon discovery. *Id.* at 224-25. But that is not what happened here. Natural Life waited to introduce the document, apparently "the crux of Natural Life's defense" (Br. 37), until after counsel for the General Counsel rested her case-in-chief and without adequately explaining its failure to produce the document. *See id.* at 223-24 (discussing exclusion of "wrongfully withheld subpoenaed document").

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[15] In *NLRB v. International Medication Systems, Ltd.*, 640 F.2d 1110 (9th Cir. 1981), the Court held that the Board could not impose discovery sanctions "before the judicial questions have been asked and answered" through subpoena enforcement proceedings in district court. *Id.* at 1115-16. That case is distinguishable. None of the Court's cited bases for the need for subpoena enforcement proceedings there are present here. Natural Life concedes that it did not strictly comply with the subpoena and that the withheld evidence is relevant to its defense. (Br. 35-37.) Moreover, Natural Life did not claim before the Board, and does not claim before the Court, that the Board lacked authority to issue sanctions and instead should have sought judicial enforcement. See *Martinez-Serrano*, 94 F.3d at 1259, Fed. R. App. P. 28(a)(8)(A), and cases cited p. 23.

As for the severity of the sanctions, Natural Life advances the confusing claim that circumstances here were not "sufficiently abnormal to justify [an adverse inference]." (Br. 37.) But here the judge did not draw an adverse inference from Natural Life's subpoena noncompliance. In addition, Natural Life mistakenly attributes its quotation (Br. 37) to *Perdue Farms, Inc., v. NLRB*, 144 F.3d 830, 834 (D.C. Cir. 1998), a case in which the D.C. Circuit found no error in the Board's preclusion of evidence as a sanction for subpoena noncompliance. *Copper River of Boiling Springs, LLC*, 360 NLRB 459 (2014), the correct source of Natural Life's quotation, is not only not precedential, but distinguishable.[16] There, the subpoenaed party explained to the judge that it could not furnish the requested materials because it did not regularly keep such materials. *See id.* at 473-75 (explaining that "when a non-culpable destruction of a document has made compliance with the subpoena impossible, it clearly would be inappropriate to penalize the party for failing to do what it cannot"). Natural Life advances no similar (or any) justification for its noncompliance.

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[16] Unreviewed administrative law judge decisions are not precedential. *See Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334, 345 (D.C. Cir. 2003) (judge decision adopted by Board without exceptions is not precedential). In *Copper River of Boiling Springs, LLC*, 360 NLRB 459 (2014), the General Counsel did not file exceptions to the cited portion of the judge's decision. *Id.* at 459 n.2, 473-75. Another administrative law judge decision, cited by Natural Life (Br. 36), is similarly unpersuasive. Although the Board affirmed that judge's decision in *Station Casinos, LLC*, 358 NLRB 1556 (2012), that case was later invalidated by the Supreme Court's decision in *NLRB v. Noel Canning*, 573 U.S. 513 (2014).

Finally, even if Natural Life could show that the Board abused its discretion in excluding the evidence, Natural Life has not showed that it was prejudiced by the evidentiary ruling.[17] As discussed above, the Board nevertheless considered Natural Life's claim that it was suffering financial losses and that those losses were its reason for discharging the entire sales department. The Board, however, adeptly rejected that explanation as pretextual, considering (among other things) that the sales department was up and running a few days later. (ER 6, 12.) Thus, Natural Life has failed to show that the excluded evidence would have made any difference in the result.

2. The Board reasonably rejected Natural Life's lack of supervision defense

Before the Board, Natural Life also claimed that it had to close its sales department and discharge all sales employees because no supervisors would be able to cover the department during Guggia's July 28 to 31 (ER 612, 666)

[17] Contrary to Natural Life's suggestion (Br. 36), the administrative law judge, on the record, did consider the prejudicial effect on the General Counsel's case of Natural Life's subpoena noncompliance. (ER 245-46.) And Natural Life fails to back up its paradoxical claim that its opponent suffered no prejudice from finding out about this "[v]ital" (Br. 34-36) document on day three of a three-day hearing. *Cf. Sw. Merch. Corp. v. NLRB*, 53 F.3d 1334, 1340 (D.C. Cir. 1995) ("General Counsel may, of course, use the employer's own response to the charges as part of his evidence of antiunion animus").

vacation.[18] The Board found this justification "frankly, laughable," and for well-supported reasons. (ER 12.)

According to the credited evidence, Finley was still sales manager at the time and had only taken a personal day on July 27 to deal with his water heater. He was expected back the next day. (ER 6, 12-13.) Plus, even if Finley was not available, Natural Life had several other individuals who could fill in temporarily, rather than take the drastic step of discharging an entire department, only to promptly rehire several of them. Natural Life had a customer service supervisor, IT Manager Hensley, and Strain—who Stoyanov considered as a possible replacement for Finley and who had been a bumper before the restructuring and served as a bumper "as needed." (ER 6, 7 & n.17, 13; ER 353-55, SER 16, 34.) Guggia also gave Stoyanov a few weeks' notice that she would be taking leave, so Stoyanov had ample time to make other supervisory arrangements. (ER 6; ER 237.) Thus, the Board concluded, Natural Life, which bore the burden of proof for its defense, "has not demonstrated any good reason why none of those individuals could have run the sales department in Guggia's stead for a period of such short duration." (ER 13.)

[18] This justification, which Natural Life only fleetingly alludes to in its opening brief (Br. 38) is at odds with Natural Life's assertion that Guggia "did not play any role in any managerial functions at Natural Life" (Br. 32). It also conflicts with Natural Life's earlier claim that its "employees were terminated *solely* because the sales room was losing money." (Br. 37 (emphasis added).)

Natural Life advances only one argument that even peripherally touches on the Board's rejection of this affirmative defense. It claims (Br. 44) that the administrative law judge not only erred in drawing an adverse inference from Natural Life's failure to call Finley to testify about the dates of his employment, but also that the error was not, as the Board found, harmless (ER 1 n.1, 6).

Natural Life, however, fails to explain how the evidentiary ruling was prejudicial, given the Board's well-supported finding that "an adverse inference about the dates of Finley's employment would not affect the outcome of the case." (ER 1 n.1.) *See Bakers of Paris*, 929 F.2d at 1434 (party challenging Board's evidentiary ruling must show both error and prejudice). As the Board explained, Natural Life's lack of supervision defense was pretextual—regardless of the judge's drawing the inference that Finley was available to supervise during Guggia's vacation—because the Board agreed with the judge that Natural Life "discharged its employees in retaliation for their engaging in protected concerted activity, not because there was no available manager." (ER 1 n.1, 12-13.) As mentioned above, the judge alternatively found that "even if [Finley] was not available," Natural Life had several other supervisory options to cover Guggia's brief absence. (ER 12-13.) And, considering the recording of Guggia explicitly linking the closure to employees' protected concerted activity, the Board did not need the adverse inference to reject Natural Life's implausible claim that it

discharged an entire department simply because Guggia was leaving for a few days on a pre-planned vacation.

Without meaningfully attacking the Board's actual findings, Natural Life advances the confusing argument (Br. 44) that the judge's adverse inference was harmful, but only if the Court agrees that two of the Board's key findings (regarding Guggia's agency and the employees' protected concerted activity) were erroneous. The Board's findings on each of those issues are well-supported by the record evidence, as discussed above. Natural Life otherwise fails to show that the judge's erroneous evidentiary ruling independently harmed its case, or that the Board erred in rejecting this affirmative defense.

CONCLUSION

The Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

STATEMENT OF RELATED CASES

Board counsel is unaware of any related cases pending in the Ninth Circuit.

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National Labor Relations Board
February 2020

STATUTORY AND REGULATORY ADDENDUM

National Labor Relations Act

National Labor Relations Board's Rules and Regulations

NATIONAL LABOR RELATIONS ACT

Sec. 2. [§152.] Definitions

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

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(13) In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Sec. 7. [§157.] Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective

bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Sec. 8 [§158.] Unfair labor practices

(a) [Unfair labor practices by employer] It shall be an unfair labor practice for an employer—

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

Sec. 10 [§160.] Prevention of unfair labor practices

(a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

(b) Complaint and notice of hearing; answer; court rules of evidence inapplicable

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor

practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

***

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there

were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

THE BOARD'S RULES AND REGULATIONS

Section 102.46 [29 C.F.R. § 102.46] Exceptions and brief in support; answering briefs to exceptions; cross-exceptions and brief in support; answering briefs to cross-exceptions; reply briefs; failure to except; oral argument; filing requirements; amicus curiae briefs.

(a) Exceptions and brief in support. Within 28 days, or within such further period as the Board may allow, from the date of the service of the order transferring the case to the Board, pursuant to § 102.45, any party may (in accordance with Section 10(c) of the Act and §§ 102.2 through 102.5 and 102.7) file with the Board in Washington, DC, exceptions to the Administrative Law Judge's decision or to any other part of the record or proceedings (including rulings upon all motions or objections), together with a brief in support of the exceptions. The filing of exceptions and briefs is subject to the filing requirements of paragraph (h) of this section

(1) Exceptions.

(i) Each exception must:

(A) Specify the questions of procedure, fact, law, or policy to which exception is taken;

(B) Identify that part of the Administrative Law Judge's decision to which exception is taken;
(C) Provide precise citations of the portions of the record relied on; and

(D) Concisely state the grounds for the exception. If a supporting brief is filed, the exceptions document must not contain any argument or citation of authorities in support of the exceptions; any argument and citation of authorities must be set forth only in the brief. If no supporting brief is filed, the exceptions document must also include the citation of authorities and argument in support of the exceptions, in which event the exceptions document is subject to the 50–page limit for briefs set forth in paragraph (h) of this section.

(ii) Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged will be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.

***

Section 102.48 [29 C.F.R. § 102.48] No exceptions filed; exceptions filed; motions for reconsideration, rehearing, or reopening the record.

(a) No exceptions filed. If no timely or proper exceptions are filed, the findings, conclusions, and recommendations contained in the Administrative Law Judge's decision will, pursuant to Section 10(c) of the Act, automatically become the decision and order of the Board and become its findings, conclusions, and order, and all objections and exceptions must be deemed waived for all purposes.

***

(c) Motions for reconsideration, rehearing, or reopening the record. A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order.

(1) A motion for reconsideration must state with particularity the material error claimed and with respect to any finding of material fact, must specify the page of the record relied on. A motion for rehearing must specify the error alleged to require a hearing de novo and the prejudice to the movant

from the error. A motion to reopen the record must state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes may have been taken at the hearing will be taken at any further hearing.

(2) Any motion pursuant to this section must be filed within 28 days, or such further period as the Board may allow, after the service of the Board's decision or order, except that a motion to reopen the record must be filed promptly on discovery of the evidence to be adduced.

(3) The filing and pendency of a motion under this provision will not stay the effectiveness of the action of the Board unless so ordered. A motion for reconsideration or rehearing need not be filed to exhaust administrative remedies.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	)	
	)	
Petitioner	)	No. 19-70392
	)	
v.	)	
	)	
NATURAL LIFE, INC. D/B/A	)	Board Case No.
HEART AND WEIGHT INSTITUTE	)	28-CA-181573
	)	
Respondent	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the Board certifies that its brief contains 12,496 words of proportionally spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

/s/ David Habenstreit
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Dated at Washington, DC
this 13th day of February 2020

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	)	
	)	
Petitioner	)	No. 19-70392
	)	
v.	)	
	)	
NATURAL LIFE, INC. D/B/A	)	Board Case No.
HEART AND WEIGHT INSTITUTE	)	28-CA-181573
	)	
Respondent	)	

CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all the parties or their counsel of record through the CM/ECF system.

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Dated at Washington, DC
this 13th day of February 2020